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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. [redacted] 16 11

ALMA MOTOR COMPANY,
Petitioner,

*vs.*

THE TIMKEN-DETROIT AXLE COMPANY
Respondent

UNITED STATES OF AMERICA,
Intervenor

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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OCTOBER TERM, 1944

No. .....

ALMA MOTOR COMPANY,
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*vs.*

THE TIMKEN-DETROIT AXLE COMPANY
Respondent

UNITED STATES OF AMERICA,
Intervenor

## PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justices and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Alma Motor Company, respectfully prays that a writ of certiorari issue to review a decision, entered in the above entitled cause, by the United States Circuit Court of Appeals for the Third Circuit, on the

7th day of September 1944, upon which decision the said court on October 2nd, 1944 entered orders (1) amending its opinion aforesaid (R. 129-130) and (2) denying the said Alma Motor Company's petition for rehearing (R. 130). This case as so amended is reported at 144 F. 2d. 714.

October 16, 1944, certified transcript of the record in this case, including the proceedings in the Third Circuit Court of Appeals was filed in this court. In accordance with the provisions of Rule 38 (8) of the Rules of the Supreme Court of the United States, a stipulation (R. 130-132) between counsel for the respective parties hereto was entered into whereby the record as printed for, and as now on file in, this court contains only the matter essention to a consideration of the questions presented by this petition.

## SUMMARY STATEMENT OF THE MATTER INVOLVED

"In the early part of 1938, the plaintiff, Timken, the defendant, Alma, and a third company, Herrington, were in interference, each with a patent application for a transfer case. The three devices were essentially the same and there were 15 counts in the interference. After some preliminary sparring in the Patent Office, there was a meeting between representatives of the three parties at the Book-Cadillac Hotel in Detroit in May, 1938 at which it was agreed that Alma should have the patent and would license the other two when it

> issued. * * * After the conference, Timken and Herrington formally conceded priority to Alma, Alma disclaimed certain counts of the interference which the parties had agreed were anticipated by prior art which had been produced and studied at the conference, and Alma and Timken executed the license agreement in question, Herrington dropping out because it had come to the conclusion that it did not want to manufacture the cases." Dist. Ct. Opinion (R. 33-4)

As a result of the foregoing, the Ruggles and Smith patent No. 2,173,044 was issued to petitioner, Alma, September 12, 1939.

The patent covers a mechanism known as a transfer case, which is an auxiliary transmission by which the drive of an automobile engine, in addition to the conventional driving of rear wheels, is extended to drive the front wheels.

January 23, 1941, respondent, The Timken-Detroit Axle Company, by filing its complaint (R. 2-9) in the United States District Court for the District of Delaware, initiated the proceedings which have brought the parties before this tribunal. Respondent under the Declaratory Judgment Act (Section 274-d Judicial Code; 28 U.S.C.A. 400) sought a determination that petitioner's United States Letters Patent 2,173,044 (Application Serial No. 7751), issued to Ruggles and Smith September 12, 1939, is invalid; not infringed by the structures manufactured, used and/or sold by the respondent (R. 7, 9); and further that the respondent—although a license agreement (R. 88-90) existed between petitioner and respondent, wherein the latter was licensed to practice the invention of the

aforesaid patent—was not obligated to pay royalties upon any of the transfer cases manufactured by respondent (R. 8).

May 5, 1944, petitioner filed an answer and counterclaim (R. 9-13) for damages resulting from respondent's refusal to pay royalties under the said license agreement.

May 18 to 22, 1942, the case duly came to trial and was tried in open court before District Judge Kirkpatrick.

September 23, 1942, District Judge Kirkpatrick filed his opinion (R. 33-49) wherein he held that the respondent Timken, being a licensee under the aforesaid patent, was estopped to contest the validity of said patent and further that certain specified transfer cases manufactured by the respondent infringed certain of the claims of the patent but that other transfer cases did not infringe.

October 31, 1942, Public Law 768, known as the Royalty Adjustment Act (R. 56-59), was passed.

December 2, 1942, judgment was entered in the District Court decreeing:

> "1. That Letters Patent of the United States No. 2,173,044, issued September 12, 1939, on the invention of Ruggles and Smith for 'Auxiliary Transmission for Four-Wheel Drive Automotive Vehicles' is owned by the defendant, Alma Motor Company.
>
> "2. Plaintiff is a licensee under such patent and has been since the issuance thereof on September 12, 1939.
>
> "3. Plaintiff is estopped to contest the validity of said Ruggles and Smith patent herein.

"4. That plaintiff has manufactured and sold auxiliary transmission mechanism since the issue date of said Ruggles and Smith patent which are dominated by one or more claims of such Ruggles and Smith patent," the Court specifying the specific transfer cases and the claims by which they are dominated, "*and that plaintiff should have paid to defendant royalties in accordance with the license agreement on all such auxiliary transfer cases.*" (Emphasis ours)

"5. The remaining auxiliary transmission mechanisms manufactured and sold by plaintiff since the issuance of the Ruggles and Smith patent either are not dominated by any claim of such Ruggles and Smith patent or no claim of royalty thereon has been made by defendant in this suit."

December 30, 1942, the office of the Chief of Ordnance, War Department, issued a notice, under Public Law 768, (R. 106-7) stating that royalty payments by respondent to petitioner were believed to be excessive and directing that no further royalties be paid in excess of that to be specified in an order to be subsequently issued.

January 8, 1943, pursuant to said notice, petitioner by written request (R. 107-8) to the Chief of Ordnance, War Department, asked that a hearing be granted petitioner.

January 28, 1943, a deputy ordnance assistant notified petitioner that the requested hearing would be had at Detroit, Michigan, on February 8, 1943 (R. 109-10).

February 8, 1943, a hearing before a Royalty Adjustment Board, consisting of two army ordnance officers and a naval officer, was held at Detroit, Michigan (R. 61-86).

February 27, 1943, petitioner filed its appeal to the Third Circuit Court from that part only of the judgment contained in paragraph 5 thereof: petitioner's appeal being specifically limited, however, to those transfer cases manufactured by respondent, Timken, and designated as the T-79 cases (R. 51-2). Respondent filed no appeal whatsoever.

July 28, 1943, the War Department, allegedly "pursuant to authority contained in the Act of October 31, 1942" (Public Law 768) issued Royalty Adjustment Order No. W-3 (R. 93-97), which order *inter alia* directed (1) respondent—the licensee, The Timken-Detroit Axle Company—to pay no further royalty to the licensor, Alma Motor Company (R. 94, par. "2"), (2) Timken was ordered "forthwith to pay over to the Treasurer of the United States the balance of any royalties, accrued or hereafter accruing," under such license "which (a) on the effective date of said notice (December 30, 1942) were due and payable to licensor but were unpaid or (b) fall due for payment at any time after the effective date of said notice • • • " (R. 95 par. "3"); and (3) Timken was ordered to reduce the contract price on all material "for which licensee has not on the date of this Order received payment" (R. 95, par. "4").

On August 25, 1943, after the issuance of the aforesaid Order No. W-3, respondent Timken filed a motion (R. 53) to dismiss petitioner Alma's appeal to the Third Circuit Court of Appeals, which appeal had been filed on the 27th day of February 1943, as above stated. It was urged (a) that said appeal be dismissed "because of transfer of jurisdiction of the subject matter to the Court of Claims under United States Public Law 768"; (R. 53) or,

in the alternative (b) that the appeal be dismissed and the cause "be remanded to the District Court of Delaware with instructions to consider its judgment in light of the War Department order issued against the parties hereto on July 28, 1943, and to take such further action as may be appropriate under the circumstances." (R. 53)

November 15, 1943, when petitioner's appeal in the Third Circuit was called for hearing, the Department of Justice presented its Motion for Leave to File a Memorandum Brief as *Amicus Curiae* in support of Timken's motion to dismiss petitioner's appeal (R. 96-97). Such leave was granted. The motion of the Government urged that petitioner's appeal had been rendered moot by the issuance of Royalty Adjustment Order No. W-3 under Public Law 768 (R. 97).

The argument at the hearing on November 15, 1943, was directed solely to the motion to dismiss the appeal, the Court declining to hear argument on the merits at that stage of the proceedings. At the conclusion of the argument the Court directed counsel for petitioner to assert Alma's position with regard to the constitutionality of the Royalty Adjustment Act (R. 113).

December 6, 1943, in response to such direction, petitioner filed its Petition to Review and Vacate Royalty Adjustment Order No. W-3 (R. 98-103). The said petition invoked the Constitution of the United States for the protection of petitioner, Alma Motor Company's, rights (R. 101) and urged:

(1) That as the notice of the hearing by the Royalty Adjustment Board on February 8, 1943, which stated that

the hearing was to be held for the purpose of examining into the reasonableness of the royalty provided for by the license contract between the parties, did not correspond with the subject matter examined into at such hearing, viz., the validity of the Ruggles and Smith patent, therefore the hearing and the order issued as the result of such hearing did not constitute due process of law (R. 101).

(2) That the Royalty Adjustment Order No. W-3 was unconstitutional as retrospective and destroyed property rights of petitioner which had become legally and completely vested long prior to the issuance of said order (R. 101-102).

(3) That as the Order providing that there should be no payment of royalty under the contract was based upon a holding of invalidity of the Ruggles and Smith patent No. 2,173,044, predicated upon "an opinion of the Chief of Ordnance" arrived at prior to said hearing; as no evidence was produced at the hearing; no proper notice of hearing was given; and no findings made to support the legal conclusion of invalidity; petitioner was divested of vested property rights without due process of law (R. 102).

(4) That as Royalty Adjustment Order No. W-3 is clearly retrospective and destroyed property rights of petitioner which had become completely and fully vested prior to the issuance of such Order, Public Law 768 is unconstitutional, insofar as it authorized the issuance of the said Order, as violative of the provisions of the Fifth Amendment to the Constitution (R. 102).

(5) That as the said Royalty Adjustment Order No. W-3 and/or Public Law 768, purports to affect and modify

a contractual obligation between private parties by authorizing a defense to said contractual obligation nonexistent at law prior to October 31, 1942, and affecting property rights that had become legally and completely vested prior to said date, said Royalty Adjustment Order and/or Public Law 768 are invalid and unconstitutional (R. 102); and

(6) That insofar as Royalty Adjustment Order No. W-3 held a duly issued United States Letters Patent invalid or insofar as Public Law 768 authorized an Administrative Board of the Executive Department to pass upon the validity of a United States patent, said Order and/or Public Law 768 is invalid and unconstitutional as (a) constituting an arbitrary and capricious exercise of power and usurpation of a purely judicial prerogative by such an Administrative Board; (b) deprived appellant of a vested property right without due process of law in contravention to the explicit prohibitions of the Fifth Amendment to the Constitution of the United States; (c) violated the provisions of Article III, Section 2 of said Constitution and violated the intent and purpose of the second paragraph of Article VI of said Constitution.

December 7, 1943, the Clerk of the Third Circuit Court of Appeals duly certified to the Attorney General, pursuant to the Act of August 24, 1937 (28 USC 401), that appellant had challenged the constitutionality of the Royalty Adjustment Act of October 31, 1942, Public Law 768 (35 USC 89, et seq.) (R. 110). The Attorney General, in response to such certification, filed a petition in the name of the United States of America for leave to intervene.

April 18, 1944, the case was again called for hearing before the Third Circuit Court of Appeals, the hearing

being directed solely to the question of the constitutionality of Royalty Adjustment Order No. W-3 and Public Law 768, on briefs and argument by the Assistant Attorney General, the Honorable Francis M. Shea for the United States, and on briefs and argument by counsel for petitioner and respondent, respectively.

August 7, 1944, the Third Circuit Court of Appeals filed its opinion, by Circuit Judge Goodrich, holding *inter alia* that the Act of October 31, 1942, Public Law 768, provided for "a taking of private property for public use" (R. 116-117); that such taking was in pursuance of the war power of the United States (R. 117); that the statute could constitutionally be applied to royalties which had accumulated prior to the statute (R. 118), and that "the statute is a constitutional exercise of the power of eminent domain by Congress in aid of its expressly granted war power" (R. 120).

The Court then directed that Paragraph 5 of the judgment of the District Court, from which petitioner had duly filed its appeal, be vacated and the

> "cause remanded to the District Court with directions to proceed no further therein unless and until it shall appear to the Court that a justiciable controversy again exists between the parties arising out of the facts set forth in the complaint, except that the Court may, if it deems such action to be appropriate, vacate all or any part of the remainder of the judgment and dismiss the complaint as moot" (R. 120-121).

September 7, 1944, petitioner filed its petition for rehearing (R. 122-129) with the Third Circuit Court of Ap-

peals, showing that an affidavit (dated August 17, 1943, and filed in said Court by respondent Timken in support of its motion to dismiss petitioner's appeal therein) by John E. Gallagher, the patent attorney in charge of the Patent Department of respondent, The Timken-Detroit Axle company, stated

> "* * * our records show that all of the transfer cases held to be infringements or now alleged to be infringements which have been manufactured and sold by The Timken-Detroit Axle Company since September 12, 1939, the date of the Ruggles and Smith patent 2,173,044, have been manufactured and sold directly or indirectly to the United States; that royalties have been charged only on T-43-P-1 and T-43-V-1 transfer cases sold to the Marmon-Herrington Company; * * *" (R. 60)

In its petition for rehearing, petitioner urged that if royalties had not been charged to the Government on any of the transfer cases involved in the litigation, *there could be no public interest in any of the royalties*, i.e., the money adjudged by the District Court to be due and payable by respondent, The Timken-Detroit Axle Company, to petitioner, Alma Motor Company, and particularly the transfer cases sold by Timken to the Government prior to July 28, 1943, the date of issuance of the Royalty Adjustment Order No. W-3, and specifically the transfer cases designated as the T-79 cases involved in the merits of the appeal to the Third Circuit Court of Appeals in this case.

October 2, 1944, the Third Circuit Court of Appeals denied petitioner's petition for rehearing without opinion (R. 130) and made a slight modification of its order filed August 7, 1944 (R. 129-130).

## JURISDICTION

(1) This is a suit arising under the Declaratory Judgment Act, Judicial Code, Sec. 274-d (28 U.S.C.A. 400) (R. 2, 8), and under the patent laws of the United States, Judicial Code, Sec. 24 (1 and 7), (28 U.S.C.A. 41, paragraphs 1 and 7) (R. 8).

(2) The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the act of February 13, 1925 (28 U.S.C.A. 347).

(3) The date of the Judgment which petitioner seeks to have reviewed is October 2, 1944.

(4) Among the cases believed to sustain jurisdiction to issue the writ, where questions of federal law of far-reaching public importance are involved, even where there are no conflicting decisions, are:

*Muncie Gear Works v. Outboard Marine & Mfg. Co.*, 315 U. S. 759;

*Mishawaka Rubber & Woolen Mfg. Co. v. Kresge Co.*, 316 U. S. 203;

*Exhibit Supply Co. v. Ace Patents Corp.*, 315 U. S. 126;

*Morton Salt Co. v. G. S. Suppiger*, 314 U. S. 488;

*Lincoln Engineering v. Stewart Warner Corp.*, 303 U. S. 545.

## THE QUESTIONS PRESENTED

1. May the jurisdiction of a Federal District Court and/or a Federal Court of Appeals once properly acquired over a case, to which their constitutional judicial powers properly extend under the provisions of Sections 1 and 2 of Article III of the Constitution of the United States, be thereafter constitutionally ousted by an Order of an Administrative Board of the Executive Department allegedly issued pursuant to the provisions of an Act of Congress passed subsequent to the acquisition of such jurisdiction?

2. May an Order of an Administrative Board allegedly issued pursuant to an Act of Congress, or said Act, insofar as it authorizes the issuance of such Order, be constitutional, as due process of law in view of the prohibitions of the Fifth Amendment to the Constitution of the United States, if

(a) such Order is retroactive;

(b) it destroys the rights of a party, under a private contract entered into long prior to the passage of the Act, to money which had become due and payable prior to the passage of the Act; and

(c) which money had been adjudged by a Federal District Court also prior to the passage of the Act to be so due and payable?

3. May the Federal right of eminent domain be constitutionally exercised under the war power of Congress

(a) to justify the sequestration or seizure by the Government, not of physical private property, the use of which is necessary for a public purpose, but of the mere money due from one private person to another private person under a purely civil contract entered into long prior to the passage of the Act, and which money was also judicially determined to be due and payable prior to the passage of such Act;

(b) in the absence of any finding in the particular case of a necessity for the taking;

(c) in the absence of any showing or finding in the record that the money so sequestered had ever been charged, or was chargeable to, the United States;

(d) and despite a contrary showing and direct averment in the record that the money due as royalties under said contract had never been charged to the United States?

(e) to authorize the private enrichment of a judgment debtor by ordering such debtor not to pay money adjudged to be due and payable to a judgment creditor as patent royalties under a private contract when such royalties were never charged to, nor paid by, the United States, and therefore there was and could be no public interest in the money due and payable by the private debtor to the private creditor.

4. May a Royalty Adjustment Order, allegedly issued pursuant to the Act of October 31, 1942 (Public Law 768), be constitutional under the provisions of Sections 1 and 2 of Article III of the Constitution of the United States if

such Order and the Act, insofar as it authorized the issuance of such Order, affects and modifies contractual obligations between private parties under a contract entered into prior to the passage of the Act; destroys the right of the creditor to proceed against the debtor with pending litigation in constitutional Federal courts; compels the creditor to institute a new suit against a different defendant, viz., the Government, in a different tribunal, the legislative Court of Claims; and authorizes a defense by the Government to the contractual obligation, which defense was non-existent at law to the debtor prior to the passage of such Act?

5. (a) May an Order issued by an Administrative Board of the Executive Department which, in effect, holds invalid a duly issued United States Letters Patent, be constitutional under the provisions of Sections 1 and 2 of Article III and paragraph 2 of Article VI of the Constitution of the United States; especially when such Order

(b) constitutes a usurpation of a purely judicial prerogative by such Administrative Board; or be constitutional as due process of law under the Fifth Amendment to said Constitution when such Order:

(c) was issued as the result of a hearing, notices of which did not correspond to the subject matter examined into at such hearing;

(d) was issued as the result of a hearing at which no evidence was introduced bearing on the question of invalidity;

(e) was issued as the result of a hearing, the transcript of the proceedings of which show that the holding of invalidity was based upon a mere opinion of an executive officer?

## REASONS FOR GRANTING THE WRIT

1 (a) The Third Circuit Court of Appeals in refusing to proceed to hear and decide petitioner's appeal on the merits decided a Federal question of far-reaching public importance in conflict with the applicable decision of this court in *Smith v. McIver*, 9 Wheat 532, 535, to the effect that "the court which first has possession of the subject *must* decide it," and the applicable decision of this Court under the Act of 1910 as amended in 1918 in *Sperry Gyroscope v. Arma Engineering Co.*, 271 U.S. 232, to the effect that as there was nothing in the Act that showed any clear purpose to take away the power to decide it became the duty of the court to consider and determine (271 U.S. at 235).

1 (b) The Third Circuit Court of Appeals in ordering the District Court to proceed no further in this case to carry into effect the previously entered judgment of the District Court decided a Federal question of far-reaching public importance in conflict with the applicable decision of this Court in *McCullough v. Virginia*, 172 U.S. 102, to the effect that the right acquired by a judgment creditor prior to a repealing act was not and could not be taken away by such act (172 U.S. at 125); in conflict with *Hodges v. Snyder*, 261 U.S. 600, to the effect that the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation (261 U.S. at 603), and also

in conflict with *Murray's Lessee et al. v. Hoboken Land and Improvement Co.* 18 How. 272, holding that Congress cannot withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law or in equity (18 How. at 284).

2 (a) The Third Circuit Court of Appeals, in deciding that the Act of October 31, 1942 could constitutionally be applied to royalties which had accumulated prior to the passage of the statute, decided a Federal question of far-reaching public importance in conflict with the applicable decisions of this Court in *Osborne v. Nicholson*, 13 Wall. 654, *Nichols v. Coolidge*, 274 U.S. 501, *Blodgett v. Holden*, 275 U.S. 142, *Untermeyer v. Anderson*, 276 U.S. 440, *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331.

2 (b). The Third Circuit Court of Appeals, by its decision in this case, decided a Federal question of far-reaching public importance in conflict with the applicable decisions of this Court in *Hepburn v. Griswold*, 8 Wall. 603 and *Bradley v. Lightcap*, 195 U.S. 1.

2 (c). The Third Circuit Court of Appeals, by its decision in this case, decided a Federal question of far-reaching public importance in conflict with the applicable decisions of this Court in *McCullough v. Virginia*, *supra*, and *Hodges v. Snyder*, *supra*.

3 (a). The Third Circuit Court of Appeals, by deciding in its opinion in this case that the taking of money by the Government due from one private person to another private person under a purely civil contract was an exer-

cise of the right of eminent domain under the war powers of Congress, decided a Federal question of far-reaching public importance, which question has never been directly ruled upon by this Court.

3 (b). By its opinion in this case the Third Circuit Court of Appeals decided a Federal question of far-reaching public importance in conflict with the applicable decisions of this Court in *Mitchell v. Harmony*, 13 How. 115.

3 (c) and (d). The decision of the Third Circuit Court of Appeals in this case is in direct conflict with the provisions of Section 7 (R. 58) of the Act of October 31, 1942 (Public Law 768) that the " • • • Act shall apply to all royalties directly or indirectly charged, or chargeable to, the United States • • • " and in holding that the taking provided for in Royalty Adjustment Order No. W-3 was "a taking of private property for public use" (R. 116), particularly in view of the fact that the record is barren of any showing or finding that the money ordered to be withheld from petitioner by said Order had ever "been charged, or was chargeable to, the United States" and despite the contrary showing and direct averment in the record that the money due petitioner as royalties under the license contract had never been charged to the United States; the decision in the foregoing respects ruled on a question of far-reaching public importance never directly ruled on by this Court.

3 (e). The Third Circuit Court of Appeals, by its decision in this case, decided a Federal question of the utmost far-reaching public importance in conflict with the applicable decision of this Court in *Osborne v. Nicholson, supra.*

4. The judgment and order of the Third Circuit Court of Appeals vacating paragraph 5 of the District Court in this case and authorizing the District Court to dismiss the complaint herein as moot, and by its opinion in holding that the relegation of petitioner to a suit in the Court of Claims, against a different defendant with a different defense, as a substitute for proceeding to carry into execution the judgment already acquired by petitioner in its favor, constitutes due process of law, decided a Federal question of far-reaching public importance in conflict with the applicable decisions of this Court in *Lynch v. United States*, 292 U.S. 571, and *Edwards v. Kearzey*, 96 U. S. 595.

5 (a). The Third Circuit Court of Appeals, by its opinion in this case, decided a Federal question of far-reaching public importance in direct conflict with the applicable decision of this Court in *McCormick Harvesting Machine Co. v. Aultman-Miller Co.*, 169 U.S. 606.

5 (b) and (c). The Third Circuit Court of Appeals, by its judgment in this case, decided a Federal question of far-reaching public importance in direct conflict with the applicable decisions of this Court in *Standard Oil Co. of Indiana v. Missouri*, 224 U.S. 270, *Powell v. Alabama*, 287 U.S. 45 and *Hagar v. Reclamation District* 108, 111 U.S. 701.

5 (d). The Third Circuit Court of Appeals, by its judgment in this case, decided a Federal question of far-reaching public important in direct conflict with the applicable decision of this Court in *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94.

Wherefore, your petitioner respectfully prays that the writ of certiorari be issued to the United States Circuit Court of Appeals for the Third Circuit, to the end that this cause may be reviewed by this Court; that the judgment of the Circuit Court of Appeals be reversed; that the cause be remanded with instructions to the Third Circuit Court of Appeals to proceed to hear petitioner's appeal therein on its merits and to direct the District Court to proceed to take such steps as may be necessary to put into effect the judgment of the Third Circuit Court of Appeals on petitioner's appeal and the District Court's judgment which had become final and that petitioner have such other and further relief as may be proper.

Respectfully submitted,

I. Joseph Farley,
Attorney for Petitioner.

# BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

## OPINIONS BELOW

The opinion of the District Court is reported at 47 Fed. Supp. 582.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported at 144 F. 2d 714.

## GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgment to be reviewed and other details justifying jurisdiction are set forth at page 12 *ante* of the accompanying petition.

## STATEMENT OF THE CASE

The foregoing petition contains a summary of the material facts necessary to an understanding of the reasons relied upon for the allowance of the writ as well as a statement of questions involved in the case. The matters presented for determination of this court relate solely to questions of law.

## SPECIFICATIONS OF ERRORS

The errors which petitioner will urge if the writ of certiorari is allowed are that the Court below erred:

(1) In permitting its jurisdiction to be ousted by the Order of an Administrative Board of the Executive Department.

(2) In deciding that the rights acquired by a judgment creditor prior to the issuance of an Administrative Order under Public Law 768 to money held by a District Court to be due and payable prior to the passage of said Law could be taken away by the passage of such Act.

(3) In holding that the statute (Public Law 768) may constitutionally be applied to royalties which had become due and payable prior to the passage of said statute.

(4) In deciding that the Federal right of eminent domain may be constitutionally exercised under the war power of Congress to justify the sequestration or seizure by the Government of mere money due from one private person to another private person.

(5) In holding that the Federal right of eminent domain may be constitutionally exercised to justify the seizure or sequestration of mere money in the absence of any finding in the particular case for necessity for the taking.

(6) In holding that the Royalty Adjustment Order No. W-3 authorized the taking of private property for public use, in the absence of any showing or finding that

the money directed to be paid by said Order to the Treasurer of the United States had ever been charged, or was chargeable to, the United States and despite a contrary showing in the record that the money due as royalties had never been so charged to the United States.

(7) In not holding that there was a taking of private property for private use in violation of petitioner's constitutional rights.

(8) In not holding as unconstitutional, as a denial of due process of law, the provisions of Public Law 768 which make the sole and exclusive remedy by a creditor against his debtor under a patent royalty contract a suit against the Government in the legislative Court of Claims and authorizes a defense by the Government to the contractual obligation, which defense was non-existent at law to the debtor prior to the passage of such Act.

(9) In not holding as unconstitutional, as a denial of due process of law, Royalty Adjustment Order No. W-3, allegedly issued pursuant to the Act of October 31, 1942 (Public Law 768), when by its opinion in this case the Court in effect held said Order destroyed the right of a judgment creditor to proceed against his judgment debtor with pending litigation in the constitutional Federal courts and compels the judgment creditor to institute a new suit against a different defendant, namely the Government, with a different defense, non-existent at law to the debtor prior to the passage of such Act and in a different tribunal, the legislative Court of Claims.

(10) In not holding that an Order of an Administrative Board of the Executive Department which in effect holds invalid a duly issued United States Letters Patent is unconstitutional as a usurpation of a purely judicial prerogative by such Administrative Board.

(11) In not holding that an Order of an Administrative Board of the Executive Department, holding a duly issued United States Letters Patent invalid, which Order was issued as a result of a hearing, notice of which did not correspond to the subject matter examined into at such hearing, is unconstitutional as a denial of due process of law under the Fifth Amendment to the Federal constitution.

(12) In not holding that an Order issued by an Administrative Board of the Executive Department, holding invalid a duly issued United States Letters Patent, is unconstitutional when such Order was issued as a result of a hearing at which no evidence was introduced bearing on the question of invalidity.

(13) In not holding that an Order of an Administrative Board of the Executive Department, holding invalid a duly issued United States Letters Patent, is unconstitutional when such Order was issued as a result of a hearing, the Transcript of the Proceedngs of which show that such holding of invalidity was based upon a mere opinion of an executive officer of the Government.

(14) In directing that Paragraph 5 of the judgment entered by the District Court in this cause be vacated.

(15) In directing that the cause be remanded to the District Court with directions to proceed no further therein.

(16) In directing that the District Court may vacate all or any part of the remainder of the District Court's judgment and dismiss the complaint as moot.

# ARGUMENT

## POINT I.

***On the proposition that the jurisdiction of a Federal District Court and/or a Federal Court of Appeals once properly acquired over a case over which the judicial power is specifically granted by the provisions of Sections 1 and 2 of Article III of the Constitution of the United States may thereafter be constitutionally ousted by an Order of an Administrative Board of the Executive Department allegedly issued pursuant to an act of Congress passed subsequent to the acquisiton of such jurisdiction.***

There can be no doubt that the District Court had full jurisdiction of the subject matter. Indeed, the jurisdiction of the Court invoked originally by respondent Timken was fully admitted by both parties. As the jurisdiction of the District Court was properly acquired and exercised over such subject matter, the right of appeal to the Third Circuit Court of Appeals inevitably followed and was perfected and fully acquired by the filing by petitioner on February 27, 1943, of its appeal from that part only of the judgment contained in paragraph 5 but limited specifically, however, to those transfer cases manufactured by Timken prior to the filing of the complaint and designated as the T-79 cases.

After the filing of the appeal, the War Department of the United States on July 28, 1943, issued its Royalty Adjustment Order holding that a "fair and just royalty" would be $0.00, ordering Timken to pay no royalties in excess of this amount—nothing—to Alma, but instead to

pay the difference between nothing and the very low, reasonable and nominal royalty of 50¢ (½%) over to the Treasurer of the United States.

On August 25, 1943, respondent Timken filed its motion in the Third Circuit Court of Appeals to dismiss petitioner Alma's appeal therein "because of the transfer of jurisdiction of the subject matter to the Court of Claims under United States Public Law 768." After hearing and argument in the Court of Appeals during which petitioner attacked the constitutionality of the Royalty Adjustment Order and Public Law 768 and during which hearing the Government appeared in support of the motion to dismiss, the Third Circuit Court of Appeals ordered: that paragraph 5 of the judgment of the District Court be vacated; that the District Court take no further action in the case, and authorized the District Court to dismiss the complaint as moot, which would therefore render nugatory and unenforceable the judgment of the District Court that certain royalties were due and payable by respondent Timken to petitioner Alma and that such royalty should have been paid.

As the action of the Third Circuit Court of Appeals in agreeing to the contentions of respondent Timken and the Government that the Royalty Adjustment Order No. W-3, allegedly issued pursuant to the provisions of Public Law 768, rendered the subject matter in issue moot and that petitioner by said order and Public Law was relegated to a new action in the Court of Claims against a new party, the Government with a new defense, it violated a principle specifically enunciated many, many years ago by the great Chief Justice Marshall in the case of *Smith v. McIver, supra*, that "the Court which first has possession of the subject must decide it."

The decision of the Third Circuit Court of Appeals in this case, in refusing to consider and determine on its merits a case between citizens of different states over which the jurisdiction of the Court had become properly vested by reason of an appeal by petitioner from the District Court, and in vacating an important part of the judgment already entered and authorizing the District Court to dismiss the complaint in the case as moot (after a full trial on the merits thereof had been had and judgment entered therein) because of the issuance of a Royalty Adjustment Order by a purely Administrative Board of the Executive Department, strikes at the very heart and foundation of one of the strongest bulwarks of American civil liberties, namely, the independence of the Federal judiciary and is in complete derogation of Sections 1 and 2 of Article III of the Constitution of the United States, which specifically assigns the judicial power to the constitutional courts of the United States. The said Court by its ruling decided Federal questions of the most far-reaching public importance which, as we shall show, are in direct conflict with the applicable and pertinent decisions of this Court and which as far as we are aware, have never been over-ruled by this Court.

Although the Court of Appeals in its opinion did not directly rule that it had no jurisdiction over petitioner's appeal to it, nor directly rule that its jurisdiction was ousted by Royalty Adjustment Order No. W-3 and Public Law 768, its refusal to proceed to consider the case on its merits and its disposition of the case was a clear and unequivocal relinquishment of the court's jurisdiction and tantamount to a direct holding that the said Order and Public Law 768 not only relieved the court of the clear judicial duty which rested upon it to consider and determine the merits of the petitioner's appeal, but that the

said Order and Law deprived the court of its judicial power so clearly conferred upon it by Sections 1 and 2 of Article III of the Constitution.

Great stress was placed by the Government in brief and argument below on the decisions of this Court under the so-called Court of Claims Act of 1910, as amended by the Act of 1918. Likewise great reliance was placed upon this Court's decisions under the 1910 Act as justifying the upholding of the constitutionality of the Act of October 31, 1942 (R. 114, 119). Although the Third Circuit Court of Appeals referred in its opinion (R. 114) to the decisions of this Court in *Crozier v. Krupp*, 224 U.S. 290, and *Richmond Screw Anchor v. United States*, 275 U.S. 331, it apparently failed to take due cognizance of the case of *Sperry Gyroscope Co. v. Arma Engineering Co.*, 271 U.S. 232, to which we directed the Court's attention. This was a case wherein the Court of Claims had dismissed *for want of jurisdiction*. The pleadings showed that charge of infringement was based upon devices sold during the years 1918 to 1923, but the record did not disclose whether some of the devices were delivered before or after July 1, 1918, the date of the passage of the Act. This Court reversed and remanded the case stating

> "• • • The true intent and meaning of the statute is not free from doubt; but certainly there is nothing therein which shows any clear purpose to take away the power to decide. It became the duty of the court below to consider and determine whether, in the circumstances stated, appellee was relieved of liability and permitted by the statute to do what otherwise would have constituted a violation of appellant's rights. There was jurisdiction." (271 U.S. at 235-6).

The language of this court in the *Sperry* case is, we submit, particularly apposite to the situation in the case

at bar. Here, just as there, the true intent and meaning of the statute is not free from doubt. Here, just as there, there is nothing in the Act which shows any clear purpose to take away the power to decide. Here, as there, it certainly was the duty of the court in the circumstances to consider and determine those rights of petitioner presented by its appeal and over which the court so clearly had complete jurisdiction under the Constitution and under the provision of Sec. 240a of the Judicial Code; 28 U. S. C. A. 347.

The Order of the Third Circuit Court of Appeals in vacating paragraph 5 of the judgment of the District Court leaves the parties without any adjudication whatsoever of their respective rights as to all of the transfer cases concerning which the District Court held no royalties were due and payable by Timken to Alma, and would mean that after the Public Law is no longer applicable, six months after the termination of the present war (Public Law 768, Sec. 7, R. 58), the judgment of the District Court would not be *res judicata* as to any of these private rights of the parties even though the subject matter had been fully litigated in the District Court and properly brought under the jurisdiction of the Court of Appeals by petitioner's appeal.

The action of the Third Circuit Court of Appeals in ordering the District Court to proceed no further in this case thereby effectually tying the court's hands and preventing it from putting into effect its conclusions arrived at by its opinion entered September 23, 1942, prior to the effective date of Public Law 768, decided a question of far-reaching public importance in direct conflict with the decision of this court in *McCullough v. Virginia, supra,* to the effect that the right acquired by a judgment creditor prior

to a repealing act was not and could not be taken away by such act (172 U.S. at 125), and was in direct conflict with the case of *Hodges v. Snyder, supra,* to the effect that the private rights of parties which had been vested by the judgment of a court cannot be taken away by subsequent legislation but must thereafter be enforced by the court regardless of such legislation (261 U.S. at 603).

The decision of the Third Circuit Court of Appeals is also in sharp and direct conflict with the older case of *Murray's Lessee, et al. v. Hoboken Land Improvement Co.* (18 How. 272), which specifically held that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity (18 How. at 284).

The District Court duly and properly held that royalties on a large number of transfer cases that had been manufactured and sold by respondent, Timken, should have been paid by Timken to Alma in accordance with the license agreement on all such auxiliary transfer cases (R. 49-50). *Respondent Timken took no appeal from such judgment* which was filed December 2, 1942. Therefore, on March 2 1943, such judgment became final and unassailable. Although we have not posed the question, we cannot refrain from remarking parenthetically that we question the jurisdiction of the Court of Appeals, in the absence of any fraud, to authorize the District Court to vacate that portion of the decree below which had become final nearly a year and a half prior to August 7, 1944, the date when the Court of Appeals entered its opinion and order in this case. Certainly this action of the Court of Appeals was an implicit holding by said court that the right acquired by the judgment creditor, the petitioner Alma, could be and was taken away by Public Law 768 and

Royalty Adjustment Order No. W-3, *contra McCullough v. Virginia, supra,* and a denial *contra Hodges v. Snyder, supra,* of the rule that the private rights of parties which have been vested by the judgment of the court cannot be taken away by subsequent legislation but must thereafter be enforced by the court regardless of such legislation. It was also an implicit holding, *contra Murray's Lessee et al. v. Hoboken Land Improvement Co., supra,* that Congress can withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law or in equity.

## POINT 2.

***(a) On the proposition that an Order of the Administrative Board allegedly issued pursuant to an act of Congress, insofar as said act authorizes the issuance of such Order, is unconstitutional under the applicable decisions of this Court if such Order is retroactive.***

The record here fully establishes that prior to September 30, 1942 the respondent The Timken-Detroit Axle Company, by the reports which it had rendered to petitioner Alma Motor Company, had manufactured and sold thousands of certain of the transfer cases which were held by the judgment of the District Court to be ones upon which Timken should have paid royalties to Alma and thousands of the T-79 transfer cases which were held by the District Court not to be dominated by any claim of the Ruggles and Smith patent (R. 103). Petitioner's appeal to the Third Circuit Court of Appeals was solely directed

to this latter holding of the District Court with respect specifically to the T-79 cases (R. 51, 52). As the judgment of the District Court (paragraph 6; R. 92) gave petitioner the right of recovery upon all transfer cases held by it to be dominated by the claims of the Ruggles and Smith patent and sold by Timken prior to the date of the judgment, November 30, 1942 (R. 49-51), the judgment clearly gave petitioner the right of a judgment creditor for recovery for all such transfer cases manufactured and sold by Timken prior to October 31, 1942, the date when Public Law 768 became law. Irrespective of the fact that petitioner's rights were those of a judgment creditor because of the fact that the court's opinion upon which the judgment was based was filed September 25, 1942, we submit, that any application of the provisions of Public Law 768, which would enable the law to reach back beyond the date of its passage to disturb contract rights of a party under a patent license contract and by means of which the licensor would have a *chose in action* against the licensee for devices made and sold prior to the passage of the Act would render the Act clearly retroactive and therefore "obnoxious to constitutional objection" (*Bradley v. Lightcap*, 195 U.S. at 19).

This court as far back as *Osborne v. Nicholson, supra*, fully considered the question of the great danger that would result if not only a mere legislative act, but an amendment to the Constitution of the United States could be made retroactive. The language of this Court in that case is so pertinent to the situation here presented that we feel we can do no better than quote it as follows:

> "But without considering at length the several assumptions of the proposition, it is a suffi-

cient answer to say that when the 13th Amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will or contract of marriage, or other contract executed according to the statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils. It would be contrary to 'the general principles of law and reason', and to one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be 'without due process of law'. This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation." 13 Wall. 654 at 662.

How apposite is this language of this Court to the situation here presented! There is no explicit declaration in the Act of October 31, 1942, "which in the slightest degree warrants the inference that those who framed or those

who adopted it intended" that it should effect contract rights which "had become legally and completely vested" prior to its passage.

This Court has uniformly held that retroactive legislation by Congress renders such legislation invalid as arbitrary and capricious.

*Nichols v. Coolidge, supra;*

*Blodgett v. Holden, supra;*

*Untermeyer v. Anderson, supra.*

It clearly indicated this in its decision in *Richmond Screw Anchor v. United States, supra.* This Court specifically held, when in construing the Act of 1910, as amended in 1918, that if the interpretation placed upon such Act by the Court of Claims in view of the provision of R. S. 3447 and which rendered the Act retroactive it would "raise a serious question as to the constitutionality of the Act of 1918 under the Fifth Amendment of the Federal Constitution" (275 U. S. at 331). We know of no case wherein this Court has ever held a retroactive act to be constitutional. Those recently decided cases of this Court cited by the Third Circuit Court of Appeals in its opinion (R. 117), *Yakus v. United States* (321 U. S. 414 (1944)), *Bowles v. Willingham* (321 U. S. 503 (1944)) and its own case, *United States v. City of Chester* (144 F. (2d) 415) (1944), as justifying such scope of governmental activity in the prosecution of the present war did not involve any question of retroactive or retrospective legislation.

**(b) *On the proposition that Royalty Adjustment Order No. W-3 or Public Law 768 insofar as it authorized the issuance of such Order is unconstitutional as a violation of the prohibition of the Fifth Amendment with respect to due process of law when such order destroyed the rights of a party, under a private contract entered into long prior to the passage of the Act, to money which had become due and payable prior to the passage of the Act.***

This Court, in *Hepburn v. Griswold, supra,* in discussing the fundamental principles which prompted the adoption of the Bill of Rights amendments, held:

> "* * * Among these fundamental principles was this:
>
> 'And in the just preservation of rights and property it is understood and declared that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with private contracts or engagements *bonafide* and without fraud previously formed'." (8 Wall. 623).

It also condemned as unconstitutional retrospective legislation in *Bradley v. Lightcap, supra; Osborne v. Nicholson, supra; Nichols v. Coolidge, supra; Blodgett v. Holden, supra,* and *Untermeyer v. Anderson, supra.* Although this court has held that contract rights acquired under a contract entered into prior to the passage of an act which rendered such contracts illegal and which may have been said to destroy contract rights previously entered into (see cases referred to by Third Circuit Court of Appeals in its opinion here: R. 118), those cases

were not ones which affected any right which had already accrued and had become vested prior to the passage of the Act but merely upheld the validity of the acts in question insofar as such acts denied a right of recovery under, or enforcement of, the contract as to rights accruing after the passage of the Act. We know of no case where this Court has ever held constitutional any legislative act which either expressly or impliedly was clearly retroactive when the question of the retroactive nature of the Act was squarely presented to the court.

**(c) *On the proposition that the decision and judgment of a Federal District Court cannot constitutionally be set aside or invalidated by an Order of an Administrative Board and/or an Act of Congress, insofar as it authorized the issuance of such Order.***

The Third Circuit Court of Appeals, by its decision in this case and its explicit directions to the District Court "to proceed no further therein" and its authorization that the District Court "may, if it deems such action to be appropriate, vacate all or any part of the remainder of the judgment, and dismiss the complaint as moot," has, to all intents and purposes ruled indirectly, if not directly, that Royalty Adjustment Order No. W-3 of an Administrative Board of the Executive Department supersedes, supplants and renders unenforceable and nugatory the judgment of the Federal District Court in this case, which held that

> "• • • plaintiff (respondent Timken) should have paid to defendant royalties in accordance with the license agreement • • •" (R. 92).

The preparation of the formal judgment which was not formally filed in the District Court until December 2, 1942, was a mere carrying into effect of the conclusions reached by the District Court in its opinion filed September 23, 1942. As far as the rights of the parties were concerned, they were settled on September 23, 1942, by the filing of the Court's opinion. The date of December 2nd, 1942, when the judgment was filed, is important only as establishing the date when the time would toll for the filing of an appeal from the decision of the District Court to the Third Circuit Court of Appeals.

Nothing could be more firmly established under the law and the applicable decisions of this Court than as stated by this Court:

> "* * * inasmuch as the judgment in the trial court was rendered, as we have seen, prior to the repealing act * * * the right acquired by the judgment creditor was not and could not constitutionally be taken away." *McCullough v. Virginia*, 172 U. S. 102, at 125.

We cannot conceive of any question that could be of greater and more far-reaching public importance than that an Order of a mere Administrative Board could be more authoritative than the judgment of a Federal Court duly rendered in a case over which the jurisdiction of the Court has been fully and properly acquired and which jurisdiction depends directly upon the explicit provisions of Article III of the Federal Constitution. To hold that such jurisdiction of the Federal judiciary may be ousted by the Order of a mere Administrative Board is to hold that the independence of the Federal judiciary, fully established by the Constitution and so jealously safeguarded by the courts during the years, is a mere myth and that Congress may at any time under the guise of the exercise

of its war powers and under the excuse of a purely suppositious and non-existent necessity render the language of the Constitution "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States • • •—between citizens of different states—• • •" entirely meaningless.

Chief Justice Marshall, in the famous case of *Marbury v. Madison*, 1 *Cranch* 137, rejected this proposition in the most uncertain terms, stating:

> "Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.
>
> "This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.
>
> "• • • Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?
>
> "This is too extravagant to be maintained." 1 *Cranch* 137, at 178.

## POINT 3.

**(a) *On the proposition that the Federal right of eminent domain cannot be constitutionally exercised under the war powers of Congress to justify the sequestration of the Government not of physical private property but of mere money due from one private person to another private person under a purely civil contract entered into long prior to the passage of the Act and judicially determined to be due and payable prior to the passage of such Act.***

We have already shown that the contract entered into between petitioner Alma and respondent Timken was entered into long prior to the passage of the Act, and that also prior thereto, the Federal District Court for the District of Delaware had ruled "that the money due as royalties under the contract should have been paid by Timken to Alma." The Third Circuit Court of Appeals in its opinion seems carefully to have avoided the very important question that all Royalty Adjustment Order No. W-3 and/or Public Law 768 authorized was the taking or sequestration of mere money for, totally ignoring the fact that all that was involved,—was money due under a private contract,—it held "what we have here is a taking of private property for public use" (R. 116).

In support of its statement "no one doubts, of course, the power of the Government to take private property for public use," it cited *North Laramie Land Co. v. Hoffman*, 268 U. S. 276; *Joslin Co. v. Providence*, 262 U. S. 668,

and *Bragg v. Weaver*, 251 U. S. 57. We submit that as a matter of pure common sense, let alone a doctrine of law, the taking of money from one individual can never, except in a most exceptional and extraordinary circumstance or emergency, constitute the taking of private property for public use.

Insofar as this case is concerned, there is nothing to show that the money involved would or could ever be put to public use. The circumstances augur otherwise because the money is directed to be paid into the Treasury to be held, we assume, in escrow. There is nothing in the provisions of Public Law 768 or Order W-3 that indicate that the money is to be used for any specific public purpose, let alone for a war purpose. This is a question that has never been directly ruled upon by this Court, as far as we have been able to ascertain. The decision of the Third Circuit Court of Appeals in this respect, however, is directly contra the entire weight of authority as enunciated by the foremost authorities and by the decisions of competent courts.

*Cooley's Constitutional Limitations*, 8th Ed., Vol. 2,1113;

*People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 424-5;

*Burnett v. Mayor etc. of the City of Sacramento*, 12 Cal. 76, 83;

*Emery v. San Francisco Gas Co.*, 28 Cal. 345, 350;

*Hammett v. Philadelphia*, 65 Pa. 146, 152-153;

*Cary Library v. Bliss*, 151 Mass. 364, 379.

**(b) *On the proposition that the Federal right of eminent domain may not be constitutionally exercised in the absence of any finding in the particular case of necessity for the taking.***

Many years ago this Court by Chief Justice Taney in dealing with the exercise of the right of eminent domain, held:

> "It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified." *Mitchell v. Harmony*, 13 How. 115.

*Mitchell v. Harmony* is still the law, as it has never been over-ruled. The rule of law above enunciated has been consistently followed in all cases involving the exercise of the right of eminent domain and that in all such cases there must be a determination or a finding of a public necessity by some competent body in each particular case. The Third Circuit Court of Appeals, we submit, completely missed the point in its ruling that "The necessity for the taking in a particular instance is for the legislative body, not the courts, assuming that the purpose is one for which the power might be exercised." Citing *North Laramie Land Co. v. Hoffman*, 268 U. S. 276; *Joslin Co. v. Providence*, 262 U. S. 668; *Bragg v. Weaver*, 251 U. S. 57 (R. 117).

In the cases cited, the legislative Act involved had to do with a carrying into effect a certain public purpose in connection with which the specific property involved

in the litigation was essential in order that the purpose could be carried out. This is not so in the case at bar because Public Law 768 is of such wide and general effect. The only purpose enunciated in the Act is that it is "to aid in the successful prosecution of the war." There is nothing whatsoever in the Act to indicate, direct or allocate any purpose for which the money is to be used and of which the Act authorizes the sequestration. There was no finding by the Royalty Adjustment Board that showed in the slightest degree any public necessity for authorizing the non-payment by Timken to Alma of the nominal, radically low, and clearly reasonable, meager royalty of ½ of 1%.

(c) ***On the proposition that the Federal right of eminent domain cannot be constitutionally exercised under Royalty Adjustment Order W-3 or under Public Law 768 to sequester money due under a private contract in the absence of any finding, or record showing, that the money so sequestered had ever been charged, or was chargeable to, the United States, and***

(d) ***Despite a direct showing and averment in the record to the contrary.***

We have already discussed the proposition that the sequestration of mere money under the guise of the exercise of the right of eminent domain is without precedent and contrary to the weight of authority. In the instant

case, however, the opinion of the Third Circuit Court of Appeals goes much farther than flouting all precedent and being contra the weight of authority for it is in flagrant disregard of the specific provisions of Public Law 768.

In the instant case petitioner, by its petition to the Third Circuit Court of Appeals to review and vacate Royalty Adjustment Order No. W-3 (R. 98-110) and by its petition for rehearing (R. 122-129), specifically directed the attention of the Third Circuit Court of Appeals to the fact that Sec. 7 of Public Law 768 states

> "Sec. 7. This Act shall apply to all royalties directly or indirectly charged or chargeable to the United States for any supplies, equipment or materials to be delivered to or for the Government from and after the effective date of the notice provided for in Section 1 hereof. This Act shall also apply to all royalties charged or chargeable directly or indirectly to the United States for supplies, equipment or materials already delivered to or for the Government which royalties have not been paid to the licensor prior to the effective date of the notice provided for in Section 1 hereof."

The Government, in its briefs and arguments in the court below, urged the validity of Public Law 768, by referring to the Court of Claims Act of 1910, and the amendment thereto by the Act of 1918, as being the "prototypes" of Public Law 768. The Third Circuit Court of Appeals apparently was swayed by these arguments for the opinion of the court shows clearly that it relied heavily upon the decisions of this Court in interpreting the Act of 1910 (R. 113-116; R. 119-120). We wish to direct the attention of the Court most forcibly to the fact that the

framers of the Act of June 25, 1910 were most careful to include therein a direct provision that the Act should not be retroactive, for the Act provided

> "The Court of Claims shall not entertain a suit or award compensation under the provisions of this section where the claim for compensation is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States *prior to June 25, 1910.*" (35 U.S.C.A. Sec. 68, p. 370). (Emphasis ours.)

The same is also true with respect to the Act of July 1, 1918, amending the 1910 Act. The Act of July 1, 1918, contains the following specific provision:

> "*Provided, however,* that said Court of Claims shall not entertain a suit or award compensation under the provision of this section where the claim for compensation is based on the use or manufacture by or for the United States of any article *heretofore* owned, leased, used by, or in the possession of the United States." (35 U.S.C.A., Sec. 68; see 1943 Cumulative Annual Pocket Part, p. 95; 40 Stat. 705.) (Emphasis ours.)

The proceedings before the committee and also in Congress show that there is no discussion with respect to the second sentence of Sec. 7 of Public Law 768 which we have quoted above. Had this sentence been given due consideration by the framers or by the Congress it would have been a very simple matter to have drafted the sentence so that it would read:

> This Act shall also apply to all royalties charged or chargeable directly or indirectly to the United States for supplies, equipment, or materials delivered *after October 31, 1942*, to or for the Govern-

> ment *and upon* which royalties have not been paid to the licensor prior to the effective date of the notice provided for in Section 1 hereof. (Italics added.)

The act, therefore, by its terms is clearly open to attack as to its constitutional validity as being retroactive. The opinion of the Court of Appeals by its utter failure to discuss the provisions of the second sentence of Section 7 of the Act indicates that the court did not give due consideration to this sentence. Had the court given proper consideration to the provision of this sentence, we respectfully submit the court could have held the Act to be constitutional if limited only to such supplies, equipment, or materials as had been delivered to the Government after October 31, 1942.

We submit, however, that the paramount issue to which a court of competent jurisdiction should first direct its attention when the validity of an Order of an Administrative Board, allegedly issued pursuant to a public act is attacked, should be that of considering whether or not the Act authorizes the issuance of the order attacked.

In this connection we direct the attention of the Court to the fact that the affidavit of John E. Gallagher (R. 60, 61) filed by respondent in support of its motion to dismiss petitioner's appeal categorically stated that the records of The Timken-Detroit Axle Company:

> . . . . *show that all of the transfer cases held to be infringements or now alleged to be infringements which have been manufactured and sold by The Timken-Detroit Axle Company since September 12, 1939, the date of Ruggles and Smith Patent 2,173,044, have been manufactured and sold directly or*

> *indirectly to the United States; that royalties have been charged only on T-43-P-1 and T-43-V-1 transfer cases sold to the Marmon-Herrington Co.;* • • •"

Apparently the Court of Appeals either refused to consider, or failed to appreciate, the significance of the latter part of this statement made under oath by Mr. Gallagher. Apparently, also, the Court was satisfied to rely upon the fact (in view of statements made by Mr. Strauch, counsel for Timken, at the hearings in open court) that all of the transfer cases in question were manufactured and sold directly or indirectly to the United States (R. 113). The Court obviously disregarded not only the statement in the Gallagher affidavit to the effect that no royalties had ever been charged prior to August 17, 1943, the date of the Gallagher affidavit, on all the transfer cases, as to which the District Court's judgment held the royalties were due and payable, and also on all of the T-79 transfer cases involved in petitioner's appeal, but also disregarded the specific provision of Section 7 Public Law 768, that the Act should apply *to royalties which were charged or chargeable to the United States.*

In this connection we also direct this Court's attention to the fact that the Third Circuit Court of Appeals failed to give due cognizance to the provisions of paragraph 4 of Royalty Adjustment Order No. W-3, reading as follows:

> "(4) that licensee is hereby directed to reduce the contract price of all supplies, equipment or materials, or parts thereof, which have been delivered or are to be delivered by licensee to or for the War Department or to any contractor or sub-contractor for the War Department *but for which licensee has not on the date of this order received payment.* • • • " (R. 95) (Emphasis ours.)

We submit that nothing could be more implicit than that, by the very terms of Royalty Adjustment Order No. W-3, all transfer cases for which the licensee (the respondent Timken) had received payment from the War Department prior to July 28, 1943, the date of the Order, were clearly eliminated from the purview of such Order.

We suggest that the Royalty Adjustment Board, which issued the Order, was derelict in its duty, as it apparently made no investigation to determine whether or not any royalty had ever been charged to the Government on all the transfer cases covered by Order W-3, manufactured and sold by Timken for use directly or indirectly by the Government. We submit, therefore, that the record in this case fails to show the existence of the prime requisite, condition precedent, only upon the presence of which, the Royalty Adjustment Board have been justified in issuing the Order. We assert that, however, in view of the categorical averments above quoted from the Gallagher affidavit, the record clearly indicates an entire absence of the condition precedent and that Public Law 768 does not authorize Royalty Adjustment Order W-3 which by its terms prevents payment by Timken to Alma of royalties never charged by Timken to the Government.

(e) ***On the proposition that the Federal right of eminent domain may not constitutionally be exercised to authorize the private enrichment of a judgment debtor at the expense of a judgment creditor by ordering such debtor not to pay money adjudged by a Federal District Court to be due and payable as patent royalties, when such royalties were never charged to or paid by the United States and therefore there was and could be no public interest in such money.***

We have already thoroughly discussed the facts pertinent to this point. Obviously, if the royalties due Alma by Timken under the license agreement had never been charged to the Government, there could be no basis or reason for any reduction of a contract price by the licensee Timken to the Government under the above quoted paragraph 4 of Royalty Adjustment Order No. W-3. Likewise nothing could be more crystal-clear that there could be no public interest in the moneys due Alma by Timken as royalties if such royalties had never been charged to the Government. We submit it to be a thoroughly foregone conclusion, that Timken, by July 28, 1943, had already received full payment for the many thousands of transfer cases sold by Timken, during the years 1940, 1941 and 1942 (see Schenck affidavit, R. 105).

There can be no question but that the Timken Company made a very appreciable profit on all of these thousands of cases and we submit that the people of the United States and the United States Government obtained more than value received when it purchased the transfer cases

embodying the Ruggles and Smith improvements and invention which the District Court found as a fact to be "simple and comparatively inexpensive means;" "the mechanism is simple, practical and substantial;" "very simple, practical and inexpensive driving mechanism." (Fact Finding 12, R. 44).

We suggest that when Timken elected not to charge royalty to the Government on "all the transfer cases held to be infringements or now alleged to be infringements" (R. 60), apparently in the mistaken belief that, even though a licensee, it could successfully attack the validity of the patent or, in the equally mistaken hope, that it could succeed in having such transfer cases held not to be dominated by the claims of the patent, it did so of its own volition and with its eyes wide open and it, and it alone, assumed the full responsibility and the full liability for payment of royalties held by the District Court to be due and payable by it to petitioner Alma.

We further submit that, in view of the foregoing, nothing could be clearer from the record than that the taking authorized by Royalty Adjustment Order No. W-3 is not "* * * a taking of private property for public use" (R. 116) as held by the Third Circuit Court of Appeals. Instead the taking is, in effect, the taking of the type condemned in *Osborne v. Nicholson, supra*, to which the following language from such case applies most pertinently:

> "* * * the proposition, if carried out in this case, would, in effect, take away one man's property and give it to another * * *" (13 Wall. 663.)

## POINT 4.

***On the proposition that the Act of October 31, 1942 (Public Law 768) is unconstitutional and violative of the provisions of Article III, Sections 1 and 2 of the Constitution; and, Royalty Adjustment Order No. W-3, allegedly issued pursuant to such Act, is unconstitutional if, as held by the Third Circuit Court of Appeals, it destroys the right of a judgment creditor to proceed with pending litigation in constitutional Federal Courts against the judgment debtor and relegates the creditor to the institution of a new suit against a different defendant, namely the Government, in a different tribunal, the Legislative Court of Claims, and authorizes a defense by the Government to a contractual obligation which defense was non-existent at law to the debtor prior to the passage of the Act.***

The situation with respect to this proposition is indeed unique. We know of no case wherein a judgment which, in effect, was rendered prior to the passage of the legislative Act was permitted to be set aside by the provisions of such Act. We have already discussed this broad general proposition under Point 1 of this brief (pp. 27-30), and have shown that the Act of the Third Circuit Court of Appeals in permitting its jurisdiction to be ousted by Royalty Adjustment Order No. W-3 and the judgment of the District Court nullified thereby is directly contra the decisions of this Court in *Smith v. McIver, supra; Sperry Gyroscope v. Arma Engineering Co., supra; McCullough v. Virginia, supra; Hodges v. Snyder, supra,* and *Murray's Lessee, et al., v. Hoboken Land Imp. Co., supra.*

The situation here is somewhat analogous to that before this Court in the case of *Lynch v. United States, supra*, wherein the Court, in considering life insurance policies issued by the Government during the last war, had before it the question of necessity of the legislation from the standpoint of national interests, but held the provision of the Fifth Amendment to be paramount to the temporary public interest. The Court held *inter alia* as follows:

> "Second. *The Fifth Amendment commands that property be not taken without making just compensation.* Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States v. Central Pacific R. Co.*, 118 U. S. 235, 238; *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67. *When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.*" 292 U. S. 571 at 579.
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> * * * * *
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> "Third. Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened." 292 U. S. 571 at 580-1.
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> * * * * *
>
> "Fourth. The question requiring decision is, therefore, whether in repealing 'all laws granting or pertaining to yearly renewable term insurance' Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States." 292 U. S. 571 at 583.

The situation, however, in the present case is much more flagrant than that in the *Lynch* case because here, as

we have already fully pointed out, the impairment of the contract which inevitably occurred as the result of the issuance of Royalty Adjustment Order No. W-3, could not and did not redound to the enrichment of the Government or add any money to the public treasury but resulted solely in the private enrichment of the respondent Timken at the expense of petitioner Alma. We quote the following most pertinent language to the situation in this case enunciated by this Court:

> "It is also the settled doctrine of this Court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. *Von Hoffman v. City of Quincy, supra; McCracken v. Hayward,* 2 How. 508."
>
> *Edwards v. Kearzey,* 96 U. S. 595 at 601.

## POINT 5.

**(a)** ***On the proposition that the power to hold a duly issued United States Letters Patent invalid cannot, under the provisions of Article III, Sections 1 and 2, and Article IV, Paragraph 2 of the Constitution of the United States, constitutionally be exercised by an Administrative Board of the Executive Department.***

Although Royalty Adjustment Order No. W-3 does not by its terms hold the Ruggles and Smith patent 2,173,044 invalid, the Order holding a "fair and just royalty to be $0.00" (R. 96) is shown by the transcript of the February 8, 1943, proceedings of the Royalty Adjustment Board (R. 61-86) in reality to be a holding of invalidity. The proceedings (R. 73) further show that the holding of invalidity was based upon a preconceived opinion of the Chief of Ordnance (R. 73). The fact that the Royalty Adjustment Order was a holding of invalidity is further corroborated by the averments in the Gallagher affidavit (R. 60, 61). Moreover the statements in the Gallagher affidavit unqualifiedly aver " * * * that the War Department's assertions of invalidity of Ruggles et al. patent 2,173,044 and the issuance of said Order is based on the art of record in this litigation; * * *." This Court is therefore confronted with the situation of an Order of a mere Administrative Board of the Executive Department overruling and reversing the judgment of a Federal District Court. One can study Public Law 768 with the greatest diligence without finding anything in the Act which shows any intention of the Congress to confer any such wide-sweeping powers on an Administrative Board of the Executive Department.

This Court has had submitted to it the question as to whether or not an executive branch of the Government has power under the Constitution to declare a duly issued United States Letters Patent invalid. This Court considered this question carefully in *McCormick Harvesting Machine Co. v. Aultman, supra*, and held therein

> "* * * that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent office * * * it is not subject to be revoked or canceled by the President or any other officer of the Government." (169 U. S. at 608.)
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> * * * * * *
>
> "The only authority competent to set a patent aside or to annul it or to correct it for any reason whatever is vested in the courts of the United States * * *" (169 U. S. at 609).

Indeed in the *McCormick* case the Court went even further in discussing the action of the Examiner in the Patent Office in rejecting the claims which had been previously allowed in an original patent for which an application for reissue had been made and said

> "His opinion thereon was but his personal opinion, and however persuasive it might be, did not oust the jurisdiction of any Court to which the owner might apply for an adjudication of his rights, * * *" (169 U. S. 611, 612).

There, the Court was dealing with the action of an Examiner in the Patent Office, assumed to be an expert in the art and in the interpretation of patents; there, this Court ruled that opinion of the Examiner did not oust the jurisdiction of any Court to which the owner might *in the future* apply for an adjudication of his rights; here, we

have the spectacle of a Royalty Adjustment Order issued by an Administrative Board of the Executive Department being given such wide-sweeping effect as to not only oust the vested jurisdiction of the Third Circuit Court of Appeals, but to completely nullify and abrogate the *judgment*, which had become final, of the United States District Court for the District of Delaware. And the Royalty Adjustment Order being based merely upon the personal opinion of the Chief of Ordnance, upon whom, as far as we know, no jurisdiction over patents has ever been conferred by statute.

(b) ***On the proposition that the Order of an Administrative Board of the Executive Department cannot be constitutional under the Fifth Amendment when such Order constitutes a usurpation of a judicial prerogative. and***

(c) ***When such Order was issued as a result of a hearing, notice of which did not correspond to the subject matter examined into at such hearing, and no evidence was introduced at the hearing bearing upon the question of invalidity.***

We believe we have fully discussed in the preceding point the proposition that, as repeatedly held by this Court, the only authority competent to set aside a patent is vested in the Courts of the United States. We believe, under the decisions of this Court, that the action of the Royalty Adjustment Board, in holding the Ruggles and Smith patent invalid, was a clear usurpation of a purely judicial prerogative by such Board. The record shows that the notice of hearing (see Exhibit H, R. 109-110) to

be held February 8, 1943, indicated clearly that the hearing was to be for the purpose of examining into whether or not the royalties being paid under the Ruggles and Smith patent 2,173,044 were unreasonable or excessive. It did not, in the slightest degree, contain any intimation that the hearing was to be directed solely to the question of the validity of the patent. The transcript of the proceedings shows that the hearing in fact was directed solely to the question of invalidity. The transcript further shows that no evidence was introduced at the hearing; that the officers of the Ordnance Department, Major Wayne L. Cockrell and Lieutenant Colonel C. E. Herrstrom, came to the hearing fully advised that "the opinion of the Chief of Ordnance is that the patent is invalid" (R. 73); that when counsel for Alma raised the point that if the Board was going into the question of the validity of the patent it should be by the presentation of full evidence, the presiding officer of the Board, Major Cockrell, stated: "It is not proposed that there shall be any argument in this proceeding at all" (R. 73).

The Third Circuit Court of Appeals, in ruling upon the proposition now under discussion, stated:

> "* * * We think that the complaint in this respect misconceives both the nature of the hearing and the order which resulted therefrom. The hearing provided for is not in the nature of a complaint before a regulatory agency, but, instead gives an opportunity for possible amicable adjustment between the Government agency and the patent owner. But the result does not bind the patent owner. By the express terms of the statute he is entitled to sue for what he believes himself to be entitled and the conclusions of the administrative officer are in no way binding upon him or the Court. Provision for such a hearing is not constitutionally required; the 1910 Act, as amended, did not include it. The

> insertion into the law of a provision for a conference which conceivably could result in mutual satisfaction to Government and patent owner can hardly be unconstitutional when no such conference is necessary as a matter of constitutional right and when its results are not binding upon the patent owner if he later seeks compensation through court action" (R. 119).

The action of the Court of Appeals, however, in refusing to hear petitioner's appeal on the merits, ordering the District Court to vacate paragraph 5 of its judgment and authorizing the District Court "to vacate all or any part of the remainder of the judgment and dismiss the complaint as moot" (R. 121) belies the statement of the Court in its opinion that "the result does not bind the patent owner." Petitioner, Alma, long prior to the issuance of the Royalty Adjustment Order No. W-3 acquired a final judgment as to "all or any part of the remainder of the judgment of the District Court." The action of the Court in issuing its Order above referred to also belies the statement of the Court that "the conclusions of the administrative officer are in no way binding upon him or the Court" (R. 119). The Third Circuit Court of Appeals by its Order to the District Court accepted Royalty Adjustment Order No. W-3 to be so sufficiently binding upon it as to completely oust its jurisdiction to hear petitioner's appeal on the merits. It went even further in authorizing the District Court to vacate all or any part of the remainder of the judgment of that Court which had become final because of respondent's failure to appeal within the statutory time limit of appeal. How can it therefore be said the Order does not bind the patent owner when petitioner is tied hand and foot and prevented from proceeding to press its final judgment to execution? In view of the force and effect given by the

Third Circuit Court of Appeals to Royalty Adjustment Order No. W-3, the Order has greater force than the judgment of the District Court. We therefore submit the following language of this Court is directly in point where in discussing the necessity for full compliance between notice and hearing this Court stated:

> "'The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the Court in rendering them would transcend the limits of its authority in those cases.' *Windsor v. McVeigh*, 93 U. S. 274, 282. See also *Reynolds v. Stockton*, 140 U. S. 254, 265-268. *Barnes v. Railway*, 122 U. S. 1, 14."

*Standard Oil Co. of Indiana v. Missouri*, 224 U. S. 270 at 282. See also *Powell v. Alabama, supra*, and *Hagar v. Reclamation District, supra*.

The Third Circuit Court of Appeals by its opinion also held that

> "The provision for recovery of compensation against the United States through suit in the Court of Claims is sufficient compliance with the constitutional provision for just compensation. *Crozier v. Krupp*, 224 U.S. 290 (1911); *Identification Devices v. United States*, 121 F. (2d) 895 (App. D.C. 1941), cert den. 314 U.S. 615 (1941), 314 U.S. 587 (1942), reh. den. 314 U.S. 710, 714 (1941), 315 U.S. 779 (1942); *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862 (D. C. Mass. 1939). This in itself would be enough to uphold the constitutionality of a statute upon this point. The constitutionality is not impaired by a provision for a conference or hearing prior to court action which, if satisfactory, amicably adjusts that which otherwise would take litigation to settle. Our conclusion is that the statute is a constitutional exercise of the power of eminent do-

main by Congress in aid of its expressly granted war power. It simply goes the one step further to cover the exercise of that power in the field of patents, which had already been made by the Act of 1910, as amended. The provision of the law for compensation to the owner is within the constitutional requirement of due process of law." (R. 119-120).

The cases cited in the above quoted part of the court's opinion all had to do with the interpretation of the Court of Claims Act of 1910 as amended by the Act of 1918. No one of these cases had anything to do with the "constitutional exercise of the power of eminent domain by Congress in aid of its expressly granted war power" (R. 120). They had to do solely with the exercise of the power of Congress under the patent clause.

The Act of 1910 specifically by its title was enacted "to provide additional protection for owners of patents," *Sperry v. Arma* (271 U.S. at 234). The 1918 amendment to the Act of 1910, as it was an amendment to the 1910 Act, was therefore also for the purpose of providing additional protection for the owners of patents. How anomalous it is to state that the provision for recovery of compensation is sufficient compliance with the constitutional provision for just compensation, and to rely upon the decisions interpreting the Court of Claims Act of 1910 as amended, as an argument or authority for the constitutionality of Public Law 768 which, so clearly does not provide additional protection for patent owners, but renders such protection most precarious and capable of being vitiated upon the mere whim or opinion of an executive officer of the Government! How can it be said that Public

Law 768 constitutes due process of law when a Royalty Adjustment Order issued under it is held to oust the jurisdiction of the Federal Court of Appeals and render the judgment creditor helpless to enforce a final judgment rendered by a Federal District Court against his judgment debtor?

How can the Act be held to constitute due process of law when it relegates petitioner to the starting of an entirely new suit, covering subject matter already fully litigated in the Federal constitutional courts, in the Court of Claims against a different defendant, the United States Government, and gives the Government a new defense not open to the judgment debtor to raise? How can it be called due process of law to prevent petitioner from recovering the money, held by the District Court to be due and payable, and to compel petitioner to start a new suit in the Court of Claims, when petitioner in such suit would be unable to show jurisdiction of the court over the subject matter, because in the present state of the record the monies which the District Court held to be due and payable to petitioner were never charged to the United States and are not now chargeable to the United States and have never been paid by the United States? Surely in such a state of affairs, petitioner could not allege in a complaint filed in the Court of Claims that the Government is withholding any money which is the property of the petitioner.

The Order of the Third Circuit Court of Appeals further deprives petitioner of its property in violation of the prohibition of the Fifth Amendment and if paragraph 5 of the judgment of the District Court is vacated and if the District Court acts upon the authorization of the Third Cir-

cuit Court of Appeals and vacates all or any part of the remainder of the judgment and dismisses the complaint as moot, the entire subject matter which was thoroughly litigated and in the main decided favorably to petitioner, would then become entirely undecided and the judgment of the District Court would not be *res judicata* as to either petitioner or respondent.

**(d) and (e)** ***On the proposition that the Order of an Administrative Board of the Executive Department does not constitute due process of law under the Fifth Amendment when the transcript of the proceedings of the hearing, as a result of which such Order was issued, shows that the holding of invalidity was based upon a mere opinion of an Executive Officer and that no finding was made by such Board nor evidence introduced at such hearing upon which the opinion of invalidity was based.***

As we have already thoroughly discussed, the transcript of the proceedings of February 8, 1943, shows that the holding of invalidity was based upon the mere opinion of an executive officer, namely the Chief of Ordnance of the War Department of the United States. The record here shows that the Board made no fact finding upon which the holding of invalidity of Royalty Adjustment Order No. W-3, was based. This Court in considering a somewhat similar situation held that a fraud order of the Postmaster General was not authorized except in cases where there was evidence to support the order, or in other words, something more than the individual opinion

of the Postmaster General. *American School of Magnetic Healing v. McAnnulty, supra.*

A mere, even cursory, examination of the transcript of the proceedings of the hearing of February 8, 1943, by the Royalty Adjustment Board which issued Order No. W-3, shows that no evidence whatsoever was introduced at the hearing, but that all of the contentions of invalidity of the Ruggles and Smith patent were mere argument of counsel. Nothing appears in the record except the statement in the Gallagher affidavit to show upon what the holding of invalidity of the Board was based. The Royalty Adjustment Order is utterly barren of any finding which in the slightest degree supports the tacit holding of invalidity. Nor is there any indication of any of the evidence which may, or may not have been considered by the Chief of Ordnance when he reached the opinion, prior to the hearing, that the Ruggles and Smith patent is invalid.

## CONCLUSION

On the foregoing argument, it is submitted that the Circuit Court of Appeals was in error in the several respects covered by the petition and brief; that its errors are in matters of wide and general importance; that it has departed from the authoritative rules of law prescribed by this Court; and that its judgment is entirely erroneous.

Wherefore your petitioner prays that its petition be granted; that the writ of certiorari be issued and the cause reviewed; that the decree of the Circuit Court of Appeals for the Third Circuit be reversed; that such Court be directed to hear petitioner's appeal on its merits; and that the District Court be directed to proceed with the necessary steps to carry into effect that part of its judgment which became final.

Respectfully submitted,

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